Annual Survey of Massachusetts Law

Volume 1957 Article 34

1-1-1957

Chapter 30: Workmen's Compensation

Joseph Bear

Larry Alan Bear

CHAPTER 30

Workmen's Compensation

JOSEPH BEAR *and* LARRY ALAN BEAR

A. COURT DECISIONS

§30.1. Third party actions. The various state workmen's compensation acts were originally intended to guarantee injured workers and their dependents a replacement of income loss at at least a subsistence level. Payments were "guaranteed" in the sense that recovery was not to be based on any common law concept of fault but, to state it broadly and a bit too simply, upon work connection.

In exchange for these assured benefits, the employee and his dependents gave up their common law rights to sue the employer for damages for any injury covered by the act.[1] However, the compensation acts were never intended to provide immunity to any stranger or ultimate wrongdoer who was in fact the cause of the employee's injury. Therefore, the acts generally provide that in any compensable industrial injury where there is ultimate legal liability on the part of some person other than the employer for the injury, the employee may elect either to sue the ultimate wrongdoer, commonly called a third party, in tort or to receive compensation. Under certain circumstances the employee is allowed to collect from both sources, although he is never allowed to retain an amount in excess of the larger of the two recoveries.

The various state statutes differ in their definition of "third parties." The majority of them state that anyone other than the worker's employer is a third party.[2] In Massachusetts, unfortunately, through a remarkably devious process of reasoning,[3] co-employees and all con-

JOSEPH BEAR and LARRY ALAN BEAR are partners in the firm of Bear and Bear, Boston and are members of the Boston, Massachusetts and American Bar Associations. Joseph Bear was consultant in Workmen's Compensation for the American Bar Association Survey of the Legal Profession. Larry Alan Bear is Vice-chairman of the Medico-Legal Committee of the Junior Bar Conference of the American Bar Association.

The authors wish to acknowledge the assistance of Philip J. Ryan, a member of the Board of Student Editors, in the preparation of Section B of this chapter.

§30.1. [1] A double compensation remedy is provided in most jurisdictions in cases in which the employer is guilty of serious and willful misconduct or its equivalent. See §30.2 *infra*.

[2] See 2 Larson, Workmen's Compensation Law §72.10 (1952), and the cases cited therein.

[3] Cf. id. §§ 72.31, 72.32.

tractors and their employees engaged upon a common employment are immune from third-party suit.[4]

The Massachusetts third-party statute,[5] construed during the SURVEY year in the leading case of *Employers Mutual Liability Insurance Co. of Wisconsin v. Ford Motor Co.*,[6] is a very confusing one. It states:

> Where the [compensable] injury was caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages or against the insurer for compensation ... but, except as hereinafter provided, not against both. If compensation be paid under this chapter, the insurer may enforce, in the name of the employee or in its own name for its own benefit, the liability of such other person, and if, in any case where the employee has claimed or received compensation within six months of the injury, the insurer does not proceed to enforce such liability within nine months of said injury, the employee may so proceed.[7]

The statute then provides that if the employee brings the action he must repay the insurer the statutory compensation benefits he has received from it but he may keep the excess. If the insurer brings the suit, it is allowed to keep, in addition to this repayment, one fifth of the excess over and above the benefits paid to the employee together with its proportionate share of the legal expenses. Furthermore, the statute provides that the employee may bring a third-party action at law and then discontinue it at any time "prior to trial." He may then pursue his compensation rights without being held to have made an election if he discontinues the third-party suit before the compensation carrier has lost its right to enforce the liability of the third party.

In the *Ford Motor* case, one H had entered into a contract with Ford to paint the interior of a Ford plant. S, an employee of H, went to the Ford plant to perform this work. Before being given license to enter the plant, S was required to sign a waiver absolving Ford of all liability for damage to his person or property. While working in the Ford plant, S was involved in an accident and sustained serious injuries. He claimed workmen's compensation and received an award five months later. No appeal was taken by his employer's compensation carrier, and the carrier did not bring any action against Ford within nine months of the employee's injury. H and his compensation carrier later brought this suit in equity, asking for a declaration as to (1) the effect of the Ford waiver upon the employer-employee

[4] Caira v. Caira, 296 Mass. 448, 6 N.E.2d 431 (1937); Bresnahan v. Barre, 286 Mass. 593, 190 N.E. 815 (1934). See also 2 Larson, Workmen's Compensation Law §§72.31-72.34 (1952).

[5] G.L., c. 152, §15.

[6] 335 Mass. 504, 140 N.E.2d 634 (1957).

[7] G.L., c. 152, §15.

relationship between H and S and (2) the effect of the Ford waiver upon the right of the insurance carrier of H to maintain a third-party action against Ford under G.L., c. 152, §15. From a Superior Court decree dismissing the bill, H and his compensation carrier appealed to the Supreme Judicial Court.

The Court affirmed the final decree, stating that since the Industrial Accident Board had already held that S was entitled to workmen's compensation, they had legally passed on the issue of the employer-employee relationship, and their adjudication, no longer subject to review or appeal, was not now open to collateral attack.[8] The Court further held that the plaintiffs were not entitled to a declaration as to the effect of the waiver on their third-party rights against Ford because they had lost all their rights to proceed against Ford by not bringing any action within nine months of the original injury.

The Court thus construed the nine-month period set forth in Section 15 as a strict limitation on the right of the insurer to bring the third-party action.[9] A contrary holding would allow the third party to be subject to two suits for the same cause of action following the passage of nine months' time after the original injury. Although this would not present an insurmountable obstacle, nevertheless since the statute provides two different proportionate methods of distributing the proceeds of a third-party suit — the deciding factor being who "brings" the action — serious problems of disposition of the excess recovery would be presented which would be difficult of solution. The Court pointed out[10] that this strict nine-month limitation is not as onerous as it might appear since the insurer may bring its third-party action once claim has been brought against it, even though it has not yet paid compensation and, in fact, even though it may deny any liability.[11]

Although this most commendable decision clears up one of the problems inherent in our third-party statute, it also obliquely serves to point out the futility of attempting to handle important third-party action problems through the medium of this poorly drafted statute. It is not feasible in this chapter to attempt to answer the perplexing problems left open by Section 15 but some of the more serious questions can be indicated.

(1) Who has the right to "bring" the third-party action when the employee has made no claim for compensation[12] within six months of the date of injury, but when he does make his claim for compensa-

8 335 Mass. 504, 506-507, 140 N.E.2d 634, 636 (1957), citing Boyle v. Building Inspector of Malden, 327 Mass. 564, 566, 99 N.E.2d 925, 927 (1951).

9 335 Mass. 504, 508, 140 N.E.2d 634, 637 (1957).

10 335 Mass. at 508n.1, 140 N.E.2d at 637n.2.

11 Furlong v. Cronan, 305 Mass. 464, 26 N.E.2d 382 (1940).

12 The date of actual receipt of compensation is of no importance if it is later in time than the claim for compensation. Cf. Furlong v. Cronan, 305 Mass. 464, 26 N.E.2d 382 (1940).

tion after six months and before the statute of limitations has run on the right to sue the third party for damages?

(2) If the employee fails to bring any claim against anyone until after the statute of limitations has run on a potential third-party action, is he thereupon barred from pursuing his compensation claim against the insurance carrier because the insurer has now lost its rights to proceed against a third party? [13]

(3) In the latter case, would it be necessary for either the administrative tribunal or the courts to decide on the merits of the third-party claim before the question could be answered? The Court has held that an employee who brings a third-party action and then discontinues it prior to trial and brings a compensation claim is barred from a compensation recovery if the statute of limitations has run on the third-party claim prior to the bringing of the compensation action.[14] But this decision was based specifically on the court's interpretation of the last sentence of Section 15, and not on the theory and purposes of Section 15 as a whole. The gravamen of that case was not the fact that the employee had taken an original position after the statute of limitations had run on the third-party claim but rather that, contrary to the exact provisions of the statute, he had shifted his position to the detriment of the insurer, so that it subsequently lost the right the employee had previously perfected by his own affirmative action.[15]

(4) What standing does the employee have in any third-party suit when the action is brought by the insurer under Section 15? Jury awards for serious injuries are rising at present and proper preparation and presentation of personal injury claims can lead to fairly substantial verdicts. The employee and his counsel have a strong interest in obtaining as large a verdict as possible to compensate the employee fully for his injuries. The insurance company and its counsel are interested primarily in getting their money back. Compensation benefits are far lower than tort benefits in most cases, and any "excess" of one over the other would have to come from the coffers of a brother insurance company or possibly from the treasury of the same insurance company if it also insured the third party. One might at least hazard the opinion that the insurer who is suing his associate or himself is likely to have a different attitude toward the ultimate verdict in any given case than the employee himself. That portion of Section 15 which requires approval of any proposed settlement by the Industrial Accident Board is not necessarily a protection for the employee because the statute does not set out what standing the employee has before the board in such a case. Unfortunately, the board has on occasion decided that the employee has no standing before it in such matters.

[13] Assume that the compensation claim itself has not been prejudiced by the delay of more than six months in filing. Cf. G.L., c. 152, §§41, 49.

[14] Broderick's Case, 320 Mass. 149, 67 N.E.2d 897 (1946).

[15] 320 Mass. at 152-154, 67 N.E.2d at 899-900.

(5) A third-party verdict brings a final definitive sum certain. Compensation benefits, subject to certain dollar limitations,[16] may extend into the indefinite future.[17] How much reimbursement is the insurer entitled to if it is still paying compensation at the time that the third-party verdict is rendered or, even if not, if the compensation claim is still open into the indefinite future?

These are some of the more important problems left unanswered by the third-party statute.[18] The answer to these problems could be obtained in lengthy, costly litigation. This is unsatisfactory for many reasons, the primary one being that broad unsettled questions and extensive appellate litigation are against the very purposes of the compensation system itself.[19] The only acceptable solution is the prompt enactment of the statute properly redrafted to cover the serious defects now existing.

§30.2. Double compensation. *Diaduk's Case*[1] and *Juozapaitis's Case*,[2] decided during the SURVEY year, concern the double compensation feature of the Workmen's Compensation Act.[3] They seem to cast more shadows over the already somber employer liability provision in our law. The section reads:

> If the employee is injured by reason of the serious and wilful misconduct of an employer or any person regularly entrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In case the employer is insured, he shall repay to the insurer the extra compensation paid to the employee.[4]

This section is worded exactly as it was in the original statute of 1912, making it one of the very few sections that have undergone no change in over forty-five years.[5]

One might inquire as to what prompted the framers of our act

16 G.L., c. 152, §§34, 35.

17 Id. §§30, 34A.

18 Very recently the Court decided the evidentiary problem presented when the third-party defendant seeks to introduce evidence regarding compensation payments claimed by or made to the employee. The Court held the evidence to be inadmissible since the third party could not defeat or diminish the recovery against it by showing negotiations between the employee and the compensation carrier. Dreher v. Bedford Realty, Inc., 335 Mass. 245, 140 N.E.2d 180 (1957).

19 See Riesenfeld, Forty Years of American Workmen's Compensation, 7 NACCA L.J. 15 (1951); Wambaugh, Workmen's Compensation Acts, 25 Harv. L. Rev. 129 (1911).

§30.2. 1 1957 Mass. Adv. Sh. 623, 142 N.E.2d 356.

2 335 Mass. 137, 138 N.E.2d 756 (1956).

3 G.L., c. 152, §28.

4 Ibid.

5 Acts of 1912, c. 571, § 1 added provisions relative only to the right of the employer to defend against these actions. Acts of 1934, c. 292, §2 added provisions relative to minors only in which violation of labor laws (c. 149) are concerned. Acts of 1943, c. 529, §9 only substituted text language relative to the status of an employer as insured or self-insured.

to insert this employer personal liability into a completely new piece of social legislation. This is especially true since the concept of this legislation was so new and revolutionary that scholars were still arguing the constitutionality of the basic payments to be made to injured workers without fault on the part of the employer. Those who drew up the original act — the Commission on Compensation for Industrial Accidents which inserted this employer-personal-liability clause — stated the reason as follows: "This section will cover the failure by the employer or his superintendent to comply with statutory safety regulations so that it will operate to prevent the breach of such rules."[6]

Of course, the statutory words used by the Commission were also strong enough to include any quasi-criminal conduct on the part of the employer or his superintendent, when workers were ordered to do work of a patently dangerous nature. But the framers of the act were apparently not concerned with that sort of conduct. That such conduct would be implicitly covered here was, no doubt, taken for granted. What they were disturbed about was the violation of statutory safety regulations by employers and the prevention of these violations. The Commission included in their report and discussion the language of comparable compensation act provisions in other jurisdictions.[7] Their clear intent, then, was to promote safety in industry by imposing personal liability upon employers whose workshops and factories were or would continue to be a serious menace to workers.

However, the Court, showing an astonishing lack of appreciation and understanding of this new social concept, seemed very reluctant to impose personal liability upon an employer for this sort of undesirable conduct. It unfortunately has looked at this double compensation feature from the point of view of the employer and not the injured worker, overlooking in effect that the compensation laws were written not for the benefit of employers but of employees.[8] While the general theory behind workmen's compensation continued to become liberalized as the years advanced, the double compensation feature of our act was and still is being strictly interpreted in a most archaic fashion.

Burn's Case[9] was the first case in which the Court was called upon to interpret this section. It held that the words "serious and wilful" were tantamount to "wanton and reckless" and applied also to conduct of a "quasi-criminal nature," citing a list of common law cases,

[6] Report of the Commission on Compensation for Industrial Accidents, July 1, 1912, p. 48. The report was submitted in accordance with Resolves of 1910, c. 120, and Resolves of 1911, cc. 66, 110.

[7] Report of the Commission on Compensation for Industrial Accidents, July 1, 1912, pp. 74 (Spain), 78 (California), 88 (New York).

[8] Meley's Case, 219 Mass. 136, 139, 106 N.E. 559, 560 (1914); 1 Larson, Workmen's Compensation Law §2.20 (1952).

[9] 218 Mass. 8, 10, 105 N.E. 601, 602 (1914).

and avoided completely any discussion of the intent of the framers of the original act. In *Sciola's Case*,[10] the Industrial Accident Board found a failure to install safety devices as recommended by statute but refused to rule that this constituted serious and willful misconduct. The Court upheld this refusal saying that the board did not have to rule as a matter of law that this was serious and willful misconduct. In *Beckles's Case*,[11] the board found that a contributing cause of the employee's death was the gross negligence of the employer in continuing to maintain and operate an elevator which experience should have told him could not be put into perfectly safe condition by the ordinary repairs attempted and made; however, the Court affirmed a finding that this did not constitute serious and willful misconduct.

The Court in interpreting this section has apparently placed special significance on the doing of something, either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.[12] But a person does not have to do anything to be guilty of serious and willful misconduct. It was, in fact, lack of action by employers which originally prompted the enactment of this double compensation clause.

In *Diaduk's Case*[13] the employee suffered a fatal accident and the widow claimed double compensation, alleging that the employer's violation of a regulation of the Department of Labor and Industries, made pursuant to statute, constituted serious and willful misconduct. The board found that the employee's death was caused "by negligence and disregard of the existing regulations on the part of the employer," but, following the language of the Court in similar cases, dismissed the double compensation claim, finding that the disregard of the existing regulations "was not such as to constitute serious and wilful misconduct nor wanton and reckless disregard of its probable consequences."[14] The Court affirmed the dismissal of the award stating that this finding was not unsupported by the evidence nor contrary to law.[15]

Juozapaitis's Case[16] involved a 14½-year-old boy. A child's right to double compensation is based not only on the original section of the act but also upon a subsequent amendment which covers certain labor law violations in the case of minors.[17] Because the statute refers to

[10] 236 Mass. 407, 128 N.E. 666 (1920).
[11] 230 Mass. 272, 119 N.E. 653 (1918).
[12] Randolph's Case, 247 Mass. 245, 247, 141 N.E. 865, 866 (1924).
[13] 1957 Mass. Adv. Sh. 623, 142 N.E.2d 356.
[14] 1957 Mass. Adv. Sh. at 624, 142 N.E.2d at 357.
[15] 1957 Mass. Adv. Sh. at 624, 625, 142 N.E.2d at 358. See §33.1 *infra* for a discussion of the judicial notice of administrative regulations issue in this case and Juozapaitis's Case, 335 Mass. 137, 138 N.E.2d 756 (1956). The Court held that, even if the regulations were properly before them, the double compensation claim would still not lie.
[16] 335 Mass. 137, 138 N.E.2d 756 (1956).
[17] Acts of 1934, c. 292, §2.

specific violations which constitute a conclusive presumption of serious and willful misconduct on the part of the employer[18] and because minors traditionally receive favored consideration from the courts,[19] the decision is more liberal.

The injured employee in this case worked for a nurseryman and florist without a working permit as required by statute.[20] This statute is not one of the prohibitive sections referred to in the double compensation section of the act[21] and for that reason the board found no serious and willful misconduct on the part of the employer. However, the Court held that inasmuch as one of the purposes of a greenhouse is the sale of flowers, it was a mercantile establishment as defined by statute,[22] and since the minor was employed in a mercantile establishment without a working permit, such employment was in violation of G.L., c. 149, §60, one of the prohibitive sections.[23]

This case and the *Diaduk* case[24] point out quite succinctly the attitude of the Court in deciding these double compensation cases. A broad and liberal view is taken in minors' cases and a narrow common law view in cases concerning adults. This latter concept is clearly at variance with that expressed by the Court itself in other cases involving the Workmen's Compensation Act.[25] The Court has talked about the compensation act as being not merely an amendment to the common law but a new and distinct piece of legislation enacted because former tort and common law remedies were, by public sentiment, regarded as inadequate.[26] It would seem, however, that as a practical matter strict tort interpretations are still applied to Section 28 of the act. Willful has been defined by the Court as an intentional wrongdoing with substantial certainty that harm will result.[27] This is the common law tort definition which has led to the very strict interpretation of legislation originally adopted along the lines of broad, liberal social policy.

It cannot fairly be said that violations of statutory regulations or safety rules are at all times made by employers with substantial certainty that violations will result in harm to their employees. But certainly workshops, factories and mercantile establishments are not going to be made any safer for workers by the decisions in these double com-

18 Ibid.

19 Ducas v. Prince, 1957 Mass. Adv. Sh. 1249, 1251, 146 N.E.2d 677, 679; West's Case, 313 Mass. 146, 151, 46 N.E.2d 760, 764 (1943).

20 G.L., c. 149, §86.

21 Id., c. 152, §28, as amended.

22 Id., c. 149, §1.

23 Id., c. 152, §28, as amended.

24 1957 Mass. Adv. Sh. 623, 142 N.E.2d 356.

25 Greem v. Cohen, 298 Mass. 439, 443, 11 N.E.2d 492, 494 (1937); Young v. Duncan, 218 Mass. 346, 349, 106 N.E. 1, 3 (1914).

26 Greem v. Cohen, 298 Mass. 439, 11 N.E.2d 492 (1937).

27 See Sheehan v. Goriansky, 321 Mass. 200, 204, 72 N.E.2d 538, 542 (1937), in which the Court quotes the definition of reckless conduct in 2 Restatement of Torts §500, Comment *f*, in pointing out the distinction between "wilful" and "reckless" conduct in the common law of torts.

pensation cases. Lack of positive intent to injure, or its equivalent, is hardly a moral excuse for industrial slaughter and if the law cannot regulate all such conduct in industry one would hope it might at least not protect it from the calculated ire of the original framers of our act. The Court could properly reverse its attitude in these double compensation cases, to the end of at least restoring the liberal precepts laid down in 1912 by the legislature. As Roscoe Pound has stated:

> I should not for a moment agree with the self-styled realists who would utterly reject *stare decisis*.... [Yet e]ven more objectionable is application of *stare decisis* to uphold decisions rendered prior to great monuments of social legislation, proceeding upon principles universally superseded by such legislation.[28]

B. Legislation

§30.3. Fatal cases: Burial expense. General Laws, c. 152, §33 has been amended by Acts of 1957, c. 270 which raises the amount payable to dependents for burial expense to $500 in each case. It further raises the liability of the insurer from $500 to $1000 in any case where there are no dependents of the deceased employee.

§30.4. Contracts or agreements to insure employers. General Laws, c. 152, §54A has been amended by Acts of 1957, c. 275 so as to make it consistent with the present c. 152, §1, the employee coverage section of the compensation act, as most recently amended by Acts of 1956, c. 680.[1]

§30.5. Concurrent liability. Acts of 1957, c. 276 adds a new section to G.L., c. 152. This new section, Section 26B, provides that where an employee engaged in concurrent employment [1] with more than one insured employer involved is injured while performing a duty that is common to all the employers, then each employer's insurer shall be jointly and severally liable for all compensation payments under the act. The payments that each insurer would be required to make would be based upon the proportion of the injured employee's total wages paid by its assured.

§30.6. Second injury fund. General Laws, c. 152, §37 has been amended by Acts of 1957, c. 287 to provide for the payment of weekly dependency compensation [1] out of the second injury fund [2] established to partially relieve the insurer of certain compensation payments in cases where the employee had suffered certain serious physical injuries prior to his latest compensable injury.

§30.7. Weekly benefits structure. The weekly dependency provi-

[28] Editorial: Some Thoughts About Stare Decisis, 13 NACCA L.J. 19, 23 (1954).

§30.4. [1] See 1956 Ann. Surv. Mass. Law § 19.9.

§30.5. [1] See 1956 Ann. Surv. Mass. Law §19.7.

§30.6. [1] G.L., c. 152, §35A.
[2] Id. §65.

sion of c. 152[1] has been amended for the second time in two years[2] by Acts of 1957, c. 641 so that, in addition to his weekly compensation payment, the employee is now entitled to a payment of $4 per week for each dependent.

§30.8. Municipal Court jurisdiction. General Laws, c. 152, §§8A, 11, and 11A have been amended by Acts of 1957, c. 693 to the end of giving the Boston Municipal Court concurrent jurisdiction with the Superior Courts in all cases of appeal from the decisions of the Industrial Accident Board when the injury involved occurred in Suffolk County. Provision is made, however, for removal of any case from the Boston Municipal Court to Suffolk Superior Court on motion of any party in interest.

§30.7. [1] G.L., c. 152, §35A.
[2] See 1956 Ann. Surv. Mass. Law §19.10.